

§ 424.57 Special payment rules for items furnished by DMEPOS suppliers and issuance of DMEPOS supplier billing numbers.

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(c) Medicare does not issue a billing number to a supplier that submits claims for items listed in § 421.210(b) of this subchapter until that supplier meets, and certifies that it meets, the following standards. The supplier—

(1) In response to orders which it receives, fills those orders from its own inventory or inventory in other companies with which it has contracted to fill such orders or fabricates or fits items for sale from supplies it buys under a contract;

(2) Is responsible for delivery of Medicare covered items to Medicare beneficiaries;

(3) Honors all warranties express and implied under applicable State law;

(4) Answers any questions or complaints a beneficiary has about the item or use of the item that was sold or rented to him or her, and refers beneficiaries with Medicare questions to the appropriate carrier;

(5) Maintains and repairs directly or through a service contract with another company, items it has rented to beneficiaries;

(6) Accepts returns of substandard (less than full quality for the particular item) or unsuitable items (inappropriate for the beneficiary at the time it was fitted and/or sold) from beneficiaries;

(7) Discloses consumer information to each beneficiary with whom it does business which consists of the supplier standards to which it must conform;

(8) Complies with the disclosure provisions in § 420.206.

(9) Complies with all applicable State and Federal licensure and regulatory requirements;

(10) Maintains a physical facility on an appropriate site; and

(11) Has proof of appropriate liability insurance.

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(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: November 22, 1995.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 1

[OST Docket No. 1; Amendment 1-272]

Organization and Delegation of Powers and Duties; Transfer of Great Lakes Pilotage Authority From the Coast Guard to the Saint Lawrence Seaway Development Corporation

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard's responsibility for administering the Secretary's functions under the Great Lakes Pilotage Act of 1960, as amended, and the Secretary's authority to enter into, revise, or amend arrangements with Canada, are being transferred to the Saint Lawrence Seaway Development Corporation. This rule affirms the interim final rule amending the delegations to be in accordance with the changed responsibilities. Although a comment period for the Secretary's delegations is not required by the Administrative Procedure Act, the Department of Transportation requested public comment on the interim final rule because of public and Congressional interest in Great Lakes Pilotage. This final rule responds to the comments and is necessary to inform the public that the interim final rule has been affirmed.

DATES: This rule is effective on December 11, 1995.

FOR FURTHER INFORMATION CONTACT: Steven B. Farbman, Office of the Assistant General Counsel for Regulation and Enforcement (202) 366-9306, United States Department of Transportation, 400 7th Street SW., Washington, DC 20590.

REGULATORY HISTORY: On July 31, 1995, the Department of Transportation (Department) published an interim final rule with request for comments (60 FR 38971). The interim final rule contained language that would transfer Great Lakes Pilotage authority from the Coast Guard to the St. Lawrence Seaway Development Corporation (SLSDC). The comment period for the interim final rule ended on September 29, 1995, and was to become effective October 30, 1995. On October 27, 1995, the Department issued a rule suspending the effectiveness of the interim final rule. This final rule affirms the interim final rule and establishes a new effective date.

SUPPLEMENTARY INFORMATION: The Coast Guard's responsibility for administering

the Secretary's functions under the Great Lakes Pilotage Act of 1960, as amended, (the Act) is being transferred to the SLSDC. This rule amends the delegations and enabling regulations to be in accordance with the changed responsibilities. The functions that are being transferred are: (1) Investigation and prosecution of violations of the Act; (2) registration, qualification, and training of registered pilots; (3) association working rules and dispatching procedures; (4) pilot working conditions; (5) selection of pilots; (6) number of pilots; (7) availability of pilots; (8) number of pilotage pools; (9) articles of association; (10) auditing; and (11) ratemaking. The licensing of pilots and the investigation and prosecution of marine accidents and incidents are essential Coast Guard safety functions that are separate from the Act and Great Lakes Pilotage Regulations. These functions will remain with the Coast Guard.

Transfer of pilotage responsibilities to the SLSDC will place pilotage under permanent civilian authority, and placing pilotage in a smaller organization with an established presence on the Great Lakes will give pilotage issues greater visibility and more timely attention. In addition, the SLSDC is being given authority to negotiate directly with Canada, which will allow timely adjustments to pilotage rates. The lack of timely adjustments has been a subject of past pilot criticism.

The Secretary's authority to enter into, revise, or amend arrangements with Canada is being delegated to the SLSDC Administrator in coordination with the General Counsel of the Department. A Memorandum of Arrangements between the United States and Canada, last renegotiated in 1977, states that the Secretary and the Minister of Transport of Canada "will arrange for the establishment of regulations imposing identical rates, charges, and any other conditions or terms for services of pilots in the waters of the Great Lakes. * * *." In 1983, the Act was amended to provide that the "Secretary, subject to the concurrence of the Secretary of State, may make agreements with the appropriate agency of Canada to * * * prescribe joint or identical rates and charges."

Discussion of Comments and Changes

The Department received comments from well over 100 commenters regarding the transfer of Great Lakes Pilotage oversight from the Coast Guard to the SLSDC. Comments on the interim final rule were received from Federal and State legislators, pilot associations

and their employees, individual pilots, professional maritime organizations, shipping associations, port authorities, labor organizations, marine service companies, an environmental group, one State regulatory agency, and interested members of the public.

The interim final rule was supported in comments from Members of Congress, individual members of the public, port authorities, labor organizations, professional maritime organizations, pilot organizations, pilots, a pilot association and its employees, and marine service companies. Among the organizations supporting the rule is the owner and operator of one of the largest fleet of Great Lakes-dedicated deep sea ships; this organization is also one of the largest consumers of pilotage services in the St. Lawrence Seaway system. Also in support of the rule was the Association of Great Lakes Ports, representing the public port authorities of Green Bay, Milwaukee, Chicago, Burns Harbor, Detroit, Monroe, Toledo, Cleveland, Erie, Ogdensburg, Superior, and Oswego. Comments in support of the transfer of delegation also came from the International Longshoremen's Association (ILA) and individual ports, representing approximately 95,000 members and associated parties. A subgroup of the ILA, representing approximately 10,000 members, the International Organization of Masters, Mates and Pilots, is in favor of transferring delegation from the Coast Guard, but want it moved to an "Undersecretary" in the Department. Of the three Great Lakes pilot associations, District 2 favors the transfer to SLSDC. As of the close of the comment period, there were 12 pilots in District 2.

Those in favor gave the following reasons in support of the transfer of delegation: (1) the SLSDC is a smaller organization than the Coast Guard, and it can significantly reduce the amount of "red tape" associated with pilotage oversight; (2) the SLSDC is a civilian agency, and it can guarantee a civilian Director of Great Lakes Pilotage with better continuity than a military Director; (3) the SLSDC's focus is on the Great Lakes; (4) pilotage issues would receive more attention from the Administrator of the SLSDC and the Secretary of Transportation; and (5) the SLSDC's interaction with all elements of the Great Lakes community would give the pilots significant new contacts with their customer base.

The interim final rule was opposed in comments from Members of Congress and State legislators, pilot associations and their employees, individual pilots, professional maritime organizations,

shipping associations, an environmental group, one State regulatory agency, and interested members of the public.

Among the organizations opposed to the transfer are the American Pilots Association, Save The River, Inc., Lake Carriers' Association, and the Association of International Ship Masters, which represents about 3,000 to 5,000 members. Of the three Great Lakes pilot associations, Districts 1 and 3 oppose the transfer. As of the close of the comment period, there were 9 pilots in District 1 and 19 pilots in District 3.

Those objecting to the transfer of authority did so for the following reasons: (1) The SLSDC is primarily concerned with economic and financial issues, and, because of this focus, it will sacrifice safety by reducing American pilotage jobs and pay, increasing hours of service, or taking other actions that will have an impact on the working conditions of pilots and, therefore, the protection of the environment; (2) many of the functions being transferred to the SLSDC are related to both safety and economics; (3) the SLSDC does not have the knowledge to oversee pilotage or negotiate with Canadian officials regarding pilotage issues; (4) the Coast Guard's recent transfer of Great Lakes pilotage oversight to the newly-established National Maritime Center (NMC) reduces red tape, and establishes a civilian Director without the need for a transfer; (5) the fate of the SLSDC is in transition because of the DOT's restructuring plans, and this restructuring will remove the SLSDC and Great Lakes pilotage from government oversight; (6) there should have been more public input and more information published regarding the transfer of authority, including extensive public hearings; (7) the interim final rule violated the notice and comment requirements of the Administrative Procedure Act (APA); and (8) Congress intended that pilotage functions remain in the Coast Guard.

The Department agrees with those commenters who stated that many of the 11 functions being transferred to the SLSDC relate in part to safety as well as economics. While the interim final rule stated that those functions "are considered to have economic effects," the Department did not mean to imply that only economic functions could be transferred. The fact that there are safety ramifications involved, however, should not, and does not, disqualify SLSDC as the agency in which the authority should reside.

Some commenters opposing the rule pointed to a November 1994 Coast Guard memorandum approved by the Secretary; attached to the November

1994 memorandum is an options paper, which noted that both safety and economic functions are vested in the Director of Great Lakes Pilotage, and that the registration of pilots is a safety function. It also acknowledged that some economic issues such as travel and work-hour limits also have safety implications (e.g., their effect on fatigue). Four options for Departmental oversight of Great Lakes pilotage functions, each listing pros and cons were provided: (1) Separate safety and economic oversight; (2) retain in the Coast Guard; (3) transfer to the Office of the Secretary (OST); and (4) transfer to SLSDC/MARAD.

Included in this last option was the following statement: "A transfer to SLSDC or MARAD may have an adverse impact on safety because the mission of each agency is economic in nature and primarily associated with promotion of shipping." The memorandum that the Secretary approved recommended that the responsibility for safety aspects of Great Lakes pilotage remain with the Coast Guard, but that economic elements of pilotage oversight be transferred to another Department office or agency. It also recommended that a Great Lakes Pilotage Working Group (Working Group) be formed to develop this option.

The Working Group was formed and included representatives from OST, the Coast Guard, MARAD, and SLSDC. In developing the option that SLSDC should assume responsibility for the 11 Great Lakes pilotage functions, the Final Report of the Working Group was not inconsistent with the November 1994 memorandum, which had stated that a transfer to SLSDC may have an adverse impact on safety. The Final Report listed the functions to be transferred under the heading, "Economic Functions," and it referred to them as "essentially economic functions. * * *". The Department believes that the 11 functions are essentially, though not entirely, economic functions. The option in the November 1994 memorandum that contained the "adverse impact on safety" statement envisioned the transfer to SLSDC of not only the 11 "essentially economic" functions, but the following two safety functions as well: (1) The licensing of pilots and (2) the investigation and prosecution of marine accidents and incidents.

The Final Report judged these to be essential Coast Guard functions solely related to safety, and said they should remain with the Coast Guard. Similarly, the November 1994 memorandum intended that responsibility for only the safety aspects of Great Lakes pilotage

remain with the Coast Guard, but not those "essentially economic" functions that also have safety ramifications. In fact, the Final Report stated that the Working Group believed that the transfer of the 11 functions out of the Coast Guard—to any other recipient, including the SLSDC—would not have a detrimental effect on safety.

Moreover, to the extent the functions involve safety, the Department has determined there is no problem transferring them to the SLSDC. As described below, the SLSDC has significant safety responsibilities, which it has performed successfully for over thirty-five years. An examination of the SLSDC's operations shows that it has an impeccable safety record with respect to its authority over one of the most difficult sections of the entire Great Lakes/Saint Lawrence Seaway System. Furthermore, in implementing its safety responsibilities, there is no evidence that the SLSDC has ever sacrificed safety considerations for economic gain.

The SLSDC operates two locks, a fleet of vessels, maintains navigational aids, and carries out safety inspections of vessels. In the St. Lawrence Seaway System, the SLSDC works closely with the Coast Guard, and performs the same Captain-of-the-Port functions in the principal operating areas of the Seaway System that the Coast Guard performs elsewhere. In the Port and Tanker Safety Act of 1978, Congress expressly reserved that authority to the SLSDC.

In addition, the SLSDC has a comprehensive emergency response plan designed to protect the environment on the St. Lawrence River and adjacent areas. The plan directly involves U.S. and Canadian Federal, state, and local governments, private organizations, and other interested parties, including pilots. The plan is in place, is tested yearly, and has been used in actual circumstances twice with complete success. This year's drill included participation by Federal, state, and local agencies, in addition to representatives from U.S. and Canadian pilot organizations.

The SLSDC also has ample, long-standing safety law enforcement experience. It is responsible for administration of the Seaway Regulations and Rules (33 CFR Part 401) regarding the clearance, readiness, and operating requirements for safe passage of vessels transiting the St. Lawrence Seaway. It operates the Seaway under these regulations, which are jointly promulgated and enforced with the Canadian Saint Lawrence Seaway Authority and which contain many vessel safety rules. In addition, its Captain-of-the-Port responsibility

carries with it enforcement authority, including the ability to fine for violations, which the SLSDC exercises under subpart B of part 401.

The SLSDC not only has this independent, significant law enforcement experience, but under an agreement with the Coast Guard, the SLSDC coordinates the exercise of its authority with related enforcement activities of the Coast Guard, including those related to pilotage. Moreover, the SLSDC's personnel carry out many of the Coast Guard inspection and related functions for the Coast Guard, including inspections performed by the SLSDC in Canadian waters before vessels transit the Seaway. In this regard, the SLSDC has the added advantages of long-standing, joint enforcement with Canada of laws and regulations relative to the Seaway, including safety laws and regulations, and ready, cooperative access to Canadian waters for joint as well as U.S. law enforcement purposes.

Several commenters cited the SLSDC's handling of an incident involving the M/T CONCORDE as a demonstration of the SLSDC's concern for economics over safety, alleging that the SLSDC permitted a master who was drunk to pilot a vessel alone. This refers to an incident in which it was reported to U.S. and Canadian authorities that the master of the M/T CONCORDE may have been intoxicated. Upon learning of these allegations, the St. Lawrence Seaway Pilots Association (SLSPA) requested permission to assign two pilots to the vessel. In response to the allegations of intoxication, the M/T CONCORDE was boarded by the Coast Guard and the master was given a breathalyzer test. The master not only passed the breathalyzer test, but he showed no signs of misuse of alcohol. As a result of the U.S. Coast Guard boarding, the Coast Guard, the SLSDC, and the Canadian Great Lakes Pilotage Authority cleared the M/T CONCORDE to proceed on its voyage without restriction with one pilot. Accordingly, the Department finds no basis for the position of those commenters who described this incident as an example of the SLSDC favoring economics over safety. Rather, the Department believes that it is an excellent example of coordination and cooperation among the Coast Guard, SLSDC, and Canadian authorities regarding safety issues that affect the entire St. Lawrence Seaway.

Some commenters objected to the interim final rule's characterization that it was issued in response to "pilot concerns;" they argued instead that it was issued in response to outside political pressure. Some commenters stated that the transfer of authority is

supported by only one Great Lakes Registered pilot, and is opposed by all three Great Lakes pilot associations.

The Department's examination of a possible transfer of Great Lakes pilotage authority was the result of a request from a delegation of interested persons, which included the President of a Great Lakes Pilot Association (also Vice President of the American Pilots Association for the Great Lakes), and President of the American Pilots Association. These organizations expressed concerns on behalf of their members about the lengthy ratemaking process and the lack of prompt attention given to pilotage issues. The Department continued its examination and discovered that similar concerns were expressed by many other interested parties throughout the Great Lakes. Commenters who believe the transfer of authority is not supported by any pilots are incorrect. While two Great Lakes Pilot Associations are opposed to the transfer, one Great Lakes Pilot Association supports the transfer. Letters of support for the transfer were also received from individual Great Lakes Registered Pilots, and from many other interested Great Lakes parties. The Department did not issue the interim final rule in response to Congressional pressure. Although the Department has received some Congressional support for the transfer, it has also received letters from individual Members of Congress expressing misgivings.

Some commenters contended that the SLSDC lacks the knowledge or experience to negotiate issues with Canada. The Department disagrees. The SLSDC has over thirty-five years of experience in direct negotiations with the government of Canada over the Joint Tariff of Tolls, Joint Seaway Operating Regulations, and other matters of mutual concern. Moreover, the SLSDC has daily contact and coordination of activities and implementation of policies with the Great Lakes Pilotage Authority, Ltd. and the Canadian Seaway authority. In this respect, the SLSDC is experienced in, and well suited to, the role of negotiator on pilotage matters with the Canadian government.

Some commenters stated that out of the 12 or so reviewers of rate adjustments, the SLSDC is the one agency that consistently opposed rate adjustments and was responsible for slowing down or halting the process. The Department, however, has found the opposite to be true. The Department has checked its records for the last seven years, the time during which a rulemaking data base has been kept, and, in that time period, the SLSDC has

not opposed rate adjustments or been responsible for slowing down or halting the process.

Some commenters declared that only the Coast Guard has pilotage expertise such as the experience to determine who is qualified to be a registered pilot. We are aware, too, that the Inspector General of the Department has sent a letter to Congressman David Obey, claiming that the SLSDC has no experience or expertise in many, if not all, of the responsibilities to be transferred. (The Inspector General also has raised this concern in the Department's coordination of the interim final rule.) The pilotage expertise resides in the Coast Guard's Great Lakes Pilotage Staff (the Staff), which is comprised of the Director of Great Lakes Pilotage, a Transportation Specialist who serves as the Assistant Director, and an Economist; the Staff and, thus, the expertise will transfer in its entirety to the SLSDC when the functions are transferred. Those who are executing the Great Lakes pilotage program now, including enforcement of the Act, will continue to do so after the transfer.

The Staff will continue to operate in the SLSDC in the same manner in which it has operated in the Coast Guard. In preparation for the upcoming winter meetings of the three pilot associations, the Director of Great Lakes Pilotage has written to each of the association presidents to make them aware of pilotage issues that he would like to discuss. In each letter, the Director stated that he would like to reach an agreement on how the process can be improved. "Identifying the areas where we need better procedures is beneficial to the system and the goals of safety. In the spirit of partnership, I hope we can improve the process together." These same goals are transferring to the SLSDC with the Director.

Moreover, since shortly before its transfer to the NMC in July 1995, the Staff has performed its Great Lakes pilotage responsibilities without receiving any specialized Coast Guard support to enable the Staff to perform these responsibilities better. It is not clear, therefore, why some believe that the expertise will suddenly evaporate when the Staff is transferred to the SLSDC. Furthermore, the SLSDC itself has developed an expertise in pilotage issues; it has directed vessel traffic in the Seaway system for decades and in so doing has substantial experience in dealing with pilots and pilotage matters. To the extent the Coast Guard has some special expertise necessary for a particular matter, the Staff can obtain

Coast Guard support regardless of where the Staff is located.

Some commenters questioned Department statements that the current Director of Great Lakes Pilotage has ten years of experience in Great Lakes Pilotage issues. The person who is the current Director became the Assistant Chief of the Coast Guard's Merchant Vessel Personnel Division in January 1985. As Assistant Chief, the Coast Guard's Pilotage Staff reported to him, and he was involved in every major pilotage policy decision. Since the function was moved from Cleveland to Washington, DC in 1990, he has been the alternate Director of Great Lakes Pilotage, that is, the person acting as Director in the latter's absence. In 1994, he assumed his present duties as Director of Great Lakes Pilotage. In addition, his career includes over 20 years of experience as a merchant marine officer, an officer in charge of U.S. naval vessels, navigation and seamanship instructor at the U.S. Naval Academy, and head of the Navigation Department at the Maritime Institute of Technology and Graduate Studies, an advanced school operated by the International Organization of Masters, Mates and Pilots. The Assistant Chief of the Pilotage staff also has many years of experience as a merchant marine officer, has commanded a vessel, and is a licensed first class pilot on the Great Lakes.

Some commenters asked what the relationship would be between the Coast Guard and the SLSDC after the transfer of delegation of pilotage functions. The Department expects the Coast Guard and SLSDC to continue their current strong relationship of cooperation and coordination. Concerning pilotage on the Great Lakes, the Coast Guard will continue to perform the functions of evaluating, testing, grading, issuing and upgrading pilot licenses, investigating accidents and other infractions, and suspending or revoking pilot licenses. The SLSDC will perform all other functions related to Great Lakes registered pilots. The Coast Guard and SLSDC will enter into a Memorandum of Agreement (MOA) to ensure coordination and cooperation between the parties.

One commenter argued that giving SLSDC the authority to enter into, revise, or amend arrangements with Canada with respect to pilotage rates, which until now has been reserved to the Secretary, may cost U.S. jobs as a bargaining tool to extract concessions from Canada on Seaway tolls. The Department disagrees. The transfer of the delegation of authority does not affect pilotage jobs, pay, or working

conditions, increase hours of service, or impact adversely on safety or the environment. There is no connection between negotiations with Canada on Seaway tolls and on pilotage rates. Pilotage rates are now set in accordance with the published methodology; because rules setting pilotage rates generally are significant, Department policy requires that they be coordinated with and cleared through several Department offices and agencies before negotiations with Canada begin. Those negotiations were routinely conducted in the past by Coast Guard staff in Cleveland with no involvement by the Office of the Secretary or any of the other Department agencies. Under this delegation, the Secretary's authority to enter into, revise, or amend arrangements with Canada must be coordinated by SLSDC with the General Counsel of the Department, in the Office of the Secretary.

That same commenter averred that the May 1972 Great Lakes Pilotage Review by the Department said that the significant policy leadership and review function must be retained by the Office of the Secretary. Policy review and oversight of pilotage is so retained. The Secretary is transferring one of his responsibilities from one agency that reports to him (the Coast Guard) to another (the SLSDC). He is not abrogating his responsibilities. The pilotage functions and personnel positions created to carry them out are designed to ensure that those responsibilities will be fully met. The individuals who occupy the positions must meet the requirements and qualifications demanded of those positions, irrespective of the agency in which they reside.

The same commenter claimed that it is the layers of review by the Office of the Secretary (OST), not the size of the Coast Guard or negotiations with Canada, that have created the less than timely attention to pilotage issues and less than timely rate adjustments. Again, the Department disagrees. Coordination by OST allows review among interested Department elements. This review is necessary in the Department's decision-making process. The Department's experience shows that OST review has not caused unreasonable delay. Furthermore, there are no "layers of review;" review by OST and other interested elements is accomplished in one step and the document is then sent to the Secretary for approval.

On the other hand, there can be multiple layers of review in Department agencies before a document is submitted to OST for coordination. Although approvals can take varying amounts of

time, the Department has no doubt that the SLSDC, with a short review process, will be able to give more timely attention to pilotage issues and make more timely rate adjustments than would the Coast Guard, including the NMC. In addition, a transfer to the SLSDC would guarantee that there would always be a civilian Director of Great Lakes Pilotage.

Some commenters believe that the transfer should not take place during the busiest part of the shipping season, *i.e.*, November and December. These commenters indicated that a transfer at this time will disrupt pilotage operations. They cited the Final Report, which says that a target date for the transfer of March 31 is believed to be necessary to minimize disruption to the operation of the pilotage pools. If the Working Group believed that there would have been disruption had the transfer taken place in April, the commenters argued, how could there not be disruption to the operation of the pilotage pools during the height of the shipping season?

The Department expects no disruption to pilotage operations, notwithstanding the position of the Working Group. The transfer does not in any way represent a shift in pilotage policies or operations. It only affects the internal delegation of responsibilities within the Department. There should be no negative effect on pilotage service. This rule will not change the pilotage rules and the manner in which they are administered, make the pilots employees of the SLSDC, or change the status or organizational structure under which the pilots now function. As it is with the Coast Guard, pilotage safety will remain the paramount concern of the SLSDC and will not become secondary to economic considerations. Since the Great Lakes Pilotage Staff is transferring with the functions, the only expected change is that the phone numbers for the Great Lakes Pilotage Staff will change. The new phone numbers will be widely distributed, and will not cause a disruption to pilotage operations.

The DOT restructuring, if it occurs, will not remove Great Lakes pilotage from Federal government oversight. The Administrator will always exercise authority over Great Lakes pilotage under a delegation from the Secretary of Transportation and his successors. The transfer would not compromise the Secretary's ability to intervene in pilotage issues should that become necessary. Even if the SLSDC were to become separate from the Department, the legislation proposed by the Administration to accomplish this

would provide for continued delegation of Secretarial authority to the SLSDC. The SLSDC would also remain a wholly-owned Federal government agency. The proposed legislation, in pertinent part, reads as follows:

(b) Section 1 of the Act of May 13, 1954, Public Law 358 (33 U.S.C. 981), as amended, is amended to read as follows:

“(a) There is hereby created a body corporate to be known as the Saint Lawrence Seaway Development Corporation (hereinafter referred to as the ‘Corporation’).

“(b) The Secretary of Transportation may delegate his or her authority to the Administrator as the Secretary deems appropriate or as directed by law.”

Thus the Secretary's ability to intervene would continue. If the legislation is enacted, the manner in which the Secretary's oversight of Great Lakes pilotage would be carried out would be set forth in a document to be published in the Federal Register.

In a “voice mail” communication from counsel for the SLSPA to an OST staff attorney, an additional argument against the transfer was posed. A memorandum concerning this communication has been entered into the docket. SLSPA's counsel points out that the Great Lakes Pilotage Act is set forth in section 46 of the United States Code (U.S.C.), which contains the following definition at 46 U.S.C. 2101:

(34) “Secretary”, except in part H, means the head of the department in which the Coast Guard is operating.

Since Great Lakes Pilotage is contained in Part F, this definition of “Secretary” pertains to it. The SLSPA maintains that whatever Congress intended to reside within the Coast Guard is contained within Title 46 under this definition and that, therefore, this transfer to the SLSDC would be in contravention of Congressional intent.

Three Members of Congress submitted to the Secretary the House Report for the legislation that defines “Secretary.” The report states: “Section 2101(34) defines ‘Secretary’ so that maritime safety and seamen's welfare jurisdiction remains within the Coast Guard at all times.” They also refer to 46 U.S.C. 2104(a), which states that “[t]he Secretary may delegate the duties and powers conferred by this subtitle [which includes Great Lakes pilotage] to any officer, employer, or member of the Coast Guard * * *.” The Congressmen conclude that the House Report and the statutory section concerning delegation “appear to confirm Congress's determination that [Great Lakes pilotage functions] reside with the Coast Guard.”

The definition of “Secretary,” which is clear on its face, does not change with

the transfer of pilotage authority to the SLSDC. The Secretary of Transportation is still the head of the Department in which the Coast Guard is operating. Upon declaration of war or when the President directs, the Coast Guard would operate in the Navy (14 U.S.C. 3). In that event, the Secretary of Defense would be the head of the Department in which the Coast Guard is operating. (*N.B.*: even during the Vietnam War and the Persian Gulf War, the Coast Guard remained part of the Department of Transportation.) The House Report explanation is not the statutory definition. Even if it were the statutory definition, it says that maritime safety is to remain in the Coast Guard at all times. While many of the 11 functions to be transferred have safety ramifications, they are still essentially economic. The House Report language did not address where functions should reside that fall outside the parameters of maritime safety and seamen's welfare jurisdiction.

That Congress did not intend that all statutory authority that comes under the above-cited definition of Secretary reside in the Coast Guard is demonstrated by the Port and Tanker Safety Act of 1978. That Act contains the following definition at 33 U.S.C. 1222:

(2) “Secretary” means the Secretary of the department in which the Coast Guard is operating.

Nevertheless, that Act also states that certain authority granted to the Secretary shall not be delegated to any agency other than the Saint Lawrence Seaway Development Corporation (33 USC 1229). Thus, Congress envisioned a situation in which authority residing within the “Department in which the Coast Guard is operating” not only could be delegated to an agency within the Department of Transportation that was not the Coast Guard, but must not be delegated to the Coast Guard. Moreover, by this language, Congress has also demonstrated that, when it intends for authority to remain within one agency and not be delegated elsewhere, it will so state.

Furthermore, had Congress desired that the Great Lakes pilotage function remain solely within the Coast Guard, it could have given the authority directly to the Commandant instead of the Secretary. By contrast, in other circumstances, Congress has given authority, not first to the Secretary to be delegated, but directly to the Federal Aviation Administrator and to the Federal Highway Administrator. For example, the Intermodal Surface Transportation Efficiency Act of 1991

(section 6016) directs the Federal Highway Administrator to conduct certain studies, while legislation concerning nationality and ownership of aircraft as well as safety regulation of civil aeronautics gives authority to the Federal Aviation Administrator (49 U.S.C. 44101 *et seq.*; 49 U.S.C. 44701 through 44717, 44720 through 44722). (N.B.: Within the safety regulation chapter, three sections, 49 U.S.C. 44718, 44719, and 44723, set forth requirements for the Secretary.)

Moreover, the Department of Transportation Act (Public Law 89-670, 1966) (DOT Act), which created the Department, specifically authorized the Federal Railroad Administrator and the Federal Highway Administrator to carry out certain functions, powers, and duties of the Secretary (section 6(f) (3)(A) and (3)(B)). Unlike 46 U.S.C. 2104(a), which states that the Secretary "may" delegate duties and powers to any officer, employee, or member of the Coast Guard, the DOT Act stated that the Federal Railroad and Highway Administrators "shall" carry out the functions, duties, and powers of the Secretary. In addition, the DOT Act did not authorize the Commandant of the Coast Guard to carry out the functions, powers, and duties of the Secretary regarding Great Lakes pilotage. On the contrary, the DOT Act, which transferred the Coast Guard to the Department, also transferred to, and vested in the Secretary, the functions, powers, and duties relating to the Coast Guard (section 6(b)(1)).

In a formal comment to the docket, the SLSPA also argued that the interim final rule violated the notice and comment requirements of the APA. It asserted that the statutory exemption from the notice and comment requirements does not extend to "any action which goes beyond formality and substantially affects the rights of those over whom the agency exercises authority." [citation omitted.] The SLSPA concluded that since this rule affects timeliness and, therefore, substantially affects the rights of pilots, the exemption does not apply. It pointed to the timely adjustments to pilotage rates as demonstrating the effect of the rule on the rights of pilots. It contended that the Department failed to provide a concise general statement of its basis and purpose, as required by the APA, and that no explanation was offered for overturning a regulation that "has been in place since DOT was established in 1967."

The Department disagrees. If the Department were to accept SLSPA's argument that, since the rule affects timeliness and, therefore, substantially

affects the rights of pilots, all delegations of authority would have to be published for notice and comment. One of the paramount reasons for delegations is to reduce delays by eliminating needless work at the top levels. All delegations, therefore, can affect timeliness. Moreover, requesting public comment on delegations of authority is not required by the APA. 5 U.S.C. 553(b)(3)(A) states that the notice and comment requirements of the APA do not apply to rules of agency organization, procedure, or practice.

The Department, therefore, disagrees with SLSPA's contention that notice and comment are required for this delegation. In its discretion, however, the Department did offer a 60-day comment period; it even suspended the effectiveness of the interim final rule to allow the Department additional time to consider all the issues raised in the comments.

The Department disagrees with the SLSPA's APA argument that the Department did not provide a concise general statement of its basis and purpose and did not offer an explanation for overturning a regulation that had been in place since the Department was established. Putting aside the question of whether a concise general statement is even required, the Department provided one. The interim final rule stated that the transfer of responsibilities from the Coast Guard to the SLSDC "will place pilotage under permanent civilian authority, and placing pilotage in a smaller organization with an established presence on the Great Lakes will give pilotage issues greater visibility and more timely attention. In addition, SLSDC is being given authority to negotiate directly with Canada, which will allow timely adjustments to pilotage rates." This statement contains the Department's basis and purpose for the change. A small SLSDC, when compared with the Coast Guard in general or even the NMC within the Coast Guard, will be able to give more timely attention to pilotage issues and make more timely rate adjustments.

Many commenters opposed to the transfer claimed that they were given no opportunity to have input into the process and therefore the interim final rule is invalid. The Department disagrees. As we have demonstrated earlier, a comment period is not required by the APA. Nevertheless, because of public and Congressional interest in Great Lakes pilotage, the Department took the extraordinary step of providing an opportunity for public comment on this rule and provided 60 days for the receipt of public comment.

In accordance with its published procedures, the Department even accepted comments after the 60 days had elapsed. The Department, thus, has provided ample opportunity for public input and has thoroughly considered that input before issuing this rule.

Several commenters, however, requested that the Department hold a public hearing. Even with respect to rulemakings for which notice and comment are required, which this rulemaking is not, the APA gives the agency discretion to hold a public hearing or not. "[T]he agency shall give interested persons an opportunity to participate in the rulemaking . . . with or without the opportunity for oral presentation." (5 U.S.C. 553(c)). By allowing interested persons to submit written views, the Department has provided the public with a greater opportunity to participate in a rule of agency organization, procedure, or practice than the APA requires. Moreover, in addition to providing the 60-day comment period, representatives from the Great Lakes Pilotage Staff and the SLSDC participated in a February 9, 1995, meeting in Chicago, organized by the Great Lakes Shipping Association, which represents vessel owners engaged in the international Great Lakes trades. Also in attendance were representatives from the three Great Lakes pilot associations and a large number of other industry representatives. At that meeting, the Staff and SLSDC representatives responded to questions from pilots and others for several hours concerning the possibility of a transfer.

In addition, during the winter of 1994-95, the Staff also met with the three pilot associations and presented to each of them a draft of the "St. Lawrence Seaway Development Corporation Pilotage Concept," which included the SLSDC's 1995 plan. The plan comprised the SLSDC's 5-year performance goals, its 3-to-5-year business focus, and its 5-to-15-year strategic goals. The document emphasized the importance of the pilotage program and the SLSDC's role in the program, when it said, "[t]he mission of the Great Lakes Pilotage Program is to protect the public, the environment, and the economic interests of foreign trade shippers by assuring that their vessels are safely navigated by competent and qualified U.S. registered pilots." Although the Staff orally requested that the associations provide reaction to this document, none was forthcoming.

In light of the many opportunities that the pilots have had to voice their opinions about the transfer and the exhaustive public record before the

Department, the Department concludes that holding a public hearing would not result in the presentation of additional or different information from what has already been submitted.

The Department stated in the interim final rule that it would consider any new matters presented and make changes if warranted. The Department has carefully considered all comments presented and concludes that no revisions to the interim final rule are warranted. Accordingly, the Department affirms, without change, the interim final rule.

A final rule redesignating those portions of the Coast Guard's Great Lakes Pilotage Regulations that are necessary for SLSDC to carry out its responsibilities under the Act will be published in the Federal Register shortly.

List of Subjects in 49 CFR Part 1

Authority delegations (Government agencies), Organizations and functions (Government agencies).

Accordingly, 49 CFR part 1 is amended as follows:

PART 1—[AMENDED]

1. The authority citation for part 1 continues to read as follows:

Authority: 49 U.S.C. 322; Pub. L. 101-552, 28 U.S.C. 2672, 31 U.S.C. 3711(a)(2).

§ 1.46 [Removed]

2. Section 1.46(a) is removed and reserved.

3. Section 1.52 is amended by adding a new paragraphs (d) and (e) to read as follows:

§ 1.52 Delegations to Saint Lawrence Seaway Development Corporation Administrator.

* * * * *

(d) Carry out the Great Lakes Pilotage Act of 1960, as amended, (46 U.S.C. 9301 *et seq.*).

(e) Under the 1977 Memorandum of Arrangements with Canada and the Great Lakes Pilotage Act of 1960, as amended in 1983 (46 U.S.C. 9305), enter into, revise, or amend arrangements with Canada in coordination with the General Counsel.

Issued at Washington, DC, this 5th day of December 1995.

Federico Peña,

Secretary of Transportation.

[FR Doc. 95-30081 Filed 12-8-95; 8:45 am]

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Research and Special Programs Administration

49 CFR Part 192

[Docket PS-135; Amdt. 192-74A]

RIN 2137-AC32

Customer-Owned Service Lines

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule; response to petition for reconsideration.

SUMMARY: This action concerns a petition to reconsider the rule that requires operators of gas service lines who do not maintain certain buried customer piping to notify customers of the need for maintenance. The request to change the rule to clarify the exclusion of customer branch lines is granted because some operators are apparently misconstruing the rule to cover these lines. The request to change the rule to specify operator repair as a maintenance option is granted because a literal reading of the rule's definition of maintenance excludes this legitimate option.

EFFECTIVE DATE: January 10, 1996.

FOR FURTHER INFORMATION CONTACT: L.M. Furrow, (202) 366-2392.

SUPPLEMENTARY INFORMATION: As directed by the 102d Congress (49 U.S.C. 60113(a)), RSPA issued a rule (49 CFR 192.16) that requires certain operators of gas service lines to notify their customers of the need to maintain buried customer piping (60 FR 41828, August 14, 1995). Operators subject to this rule are identified in the first paragraph of the rule, as follows:

§ 192.16 Customer Notification

(a) This section applies to each operator of a service line who does not maintain the customer's buried piping up to entry of the first building downstream, or, if the customer's buried piping does not enter a building, up to the principal gas utilization equipment or the first fence (or wall) that surrounds that equipment. For the purpose of this section, "maintain" means monitor for corrosion according to § 192.465 if the customer's buried piping is metallic, survey for leaks according to § 192.723, and if an unsafe condition is found, either shut off the flow of gas or advise the customer of the need to repair the unsafe condition.

In a petition dated September 8, 1995, the American Gas Association (AGA) asked RSPA to reconsider this notification rule. AGA contends § 192.16(a) is deficient in two respects. First, AGA is concerned that § 192.16(a) does not indicate that branch lines, serving secondary equipment such as yard lanterns or pool heaters, are not

part of the customer's buried piping that operators must maintain to qualify for exclusion from the rule. In fact, as AGA construes the rule, to avoid sending notifications operators would have to maintain most of these branch lines. For clarity, AGA recommends amending § 192.16(a) to refer to "buried gas supply piping" instead of "buried piping."

The amount of customer piping an operator must maintain to avoid sending customer notifications was a significant issue in this rulemaking proceeding. Of particular concern was buried piping that branches from the customer's primary gas supply line to serve secondary equipment, such as a yard lantern or pool heater. We addressed this issue in the final rule document as follows:

[w]e intended the proposed rules to apply to customers' primary gas supply lines. Branch lines that serve pool heaters, yard lanterns, or other types of secondary equipment were not intended to be covered. The final rule (§ 192.16(a)) clarifies this point by covering customer piping up to gas utilization equipment only when the customer's piping does not enter a building. (60 FR 41822)

Given this history of § 192.16(a) and the plain meaning of the rule, we do not agree with AGA that the rule can reasonably be construed to apply to most branch lines serving yard lanterns or pool heaters. As AGA acknowledges in its petition, such lines typically do not enter buildings. Buried customer piping that does not enter a building is covered only if it serves the customer's principal gas utilization equipment. And by their very nature, branch lines do not serve principal gas utilization equipment.

Nevertheless, the existence of the AGA petition indicates that some service line operators may be misconstruing the rule. Since we want to make the rule as easy as possible for everyone to understand, we have amended § 192.16(a) to emphatically state that the customer's buried piping does not include branch lines that serve yard lanterns, pool heaters, or other types of secondary equipment. We did not feel AGA's suggestion to modify "piping" with "gas supply" would necessarily clarify the rule because all customer piping provides a supply of gas.

Next, AGA argues that the definition of "maintain" is too restrictive because it does not mention repair as a method of remedying unsafe customer piping. As a result, AGA suggests § 192.16(a) could be construed to require operators to send customer notifications even if they repair unsafe conditions on customer piping. AGA recommends